

Nos. 12-1034 & 12-1123

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**SPURLINO MATERIALS, LLC and SPURLINO MATERIALS OF INDIANAPOLIS, LLC, A
SINGLE EMPLOYER**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

**COAL, ICE, BUILDING MATERIAL, SUPPLY DRIVERS, RIGGERS, HEAVY HAULERS,
WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 716**

Intervenor for Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JULIE B. BROIDO
Supervisory Attorney

GREG P. LAURO
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2965

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SPURLINO MATERIALS, LLC AND)	
SPURLINO MATERIALS OF INDIANAPOLIS,)	
LLC, A SINGLE EMPLOYER)	
)	
Petitioner)	Nos. 12-1034, 12-1123
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	25-CA-31565
)	
and)	
)	
COAL, ICE, BUILDING MATERIAL, SUPPLY)	
DRIVERS, RIGGERS, HEAVY HAULERS,)	
WAREHOUSEMEN AND HELPERS, LOCAL)	
UNION NO. 716)	
)	
Intervenor for respondent)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. ***Parties and Amici:*** Spurlino Materials, LLC, and Spurlino Materials of Indianapolis, LLC, a single employer (collectively, “the Company”), is the petitioner before the Court; it was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board. Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers,

Warehousemen and Helpers, Local Union No. 716 (“the Union”) is the intervenor before the Court; the Union was the charging party before the Board.

B. ***Ruling Under Review:*** The case involves the Company’s petition to review, and the Board’s cross-application to enforce, a Decision and Order the Board issued on December 6, 2011 (357 NLRB No. 126).

C. ***Related Cases:*** This case has not previously been before this Court or any other court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
this 27th day of September, 2012.

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter appellate jurisdiction	2
Statement of the issues presented	3
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board's findings of fact.....	4
A. The interrelationship between SM and SMI: their common ownership and management, their lack of arm's length dealings, their exchange of managers and employees, and their commonly controlled labor relations.....	4
B. The Union becomes the collective-bargaining representative of SMI's unit employees; the Board's two sitting members issue a decision and order finding that SM unlawfully discharged SMI employee Gary Stevenson for his protected union activities; the litigation over Stevenson's discharge continues	8
C. The employees unanimously vote to strike to protest the Company's ongoing refusal to reinstate Stevenson and make him whole.....	9
D. The Company, anticipating a strike, calls employees to a mandatory meeting; the litigation over Stevenson's discharge continues.....	12
E. The employees begin a strike to protest the Company's ongoing refusal to reinstate Stevenson, while offering to work only on a project covered by a no-strike agreement; the Company refuses the employees' offer and hires replacements	13
F. The Board issues a new decision and order, finding again that SM unlawfully discharged Stevenson; SMI's employees end their strike and make an unconditional offer to return to work; the Company refuses to reinstate them	16

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
II. The Board's conclusions and order	18
Standard of review	19
Summary of argument.....	20
Argument.....	23
I. Substantial evidence supports the Board's finding that the strike was an unfair labor practice strike, and therefore that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work	23
A. An employer violates Section 8(a)(3) and (1) of the Act by failing to reinstate unfair labor practice strikers upon their unconditional offer to return to work.....	24
B. The employees struck at least in part to protest the Company's unlawful refusal to reinstate Stevenson	26
1. Ample evidence supports the Board's strike-causation finding	26
2. The Company errs in asserting that the Board based its strike-causation finding on "self-serving" evidence	30
3. The Company errs in relying on an alleged time gap between its unlawful conduct and the strike	35
C. The strike was not an unprotected partial strike	37
II. Substantial evidence supports the Board's finding that SM and SMI are a single employer, and therefore that they are jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers	44

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
A. The Board may treat nominally separate business entities that are integrated with respect to ownership and operations as a single employer.....	44
B. SM and SMI are a single employer; accordingly, they are jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers	46
1. Common ownership	46
2. Common management	47
3. Interrelation of operations.....	49
4. Common control of labor relations.....	56
Conclusion	60

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adtranz ABB Daimler-Benz Transp. v. NLRB</i> , 253 F.3d 19 (D.C. Cir. 2001).....	33
<i>Alwin Mfg. Co., Inc. v. NLRB</i> , 192 F.3d 133 (D.C. Cir. 1999).....	25,30
<i>Asher Candy, Inc. v. NLRB</i> , 258 F. App'x 334 (D.C. Cir. 2007)	45
* <i>Audubon Health Care Ctr.</i> , 268 NLRB 135 (1983).....	38, 39
<i>Bolivar Tees</i> , 349 NLRB 720 (2007), <i>enforced</i> 551 F.3d 722 (8th Cir. 2008)	49
<i>Brockton Hosp. v. NLRB</i> , 294 F.3d 100 (D.C. Cir. 2002).....	19
<i>Citizens Publ. & Printing Co. v. NLRB</i> , 263 F.3d 224 (3d Cir. 2001)	27
<i>Conair Corp. v. NLRB</i> , 721 F.2d 1355 (D.C. Cir. 1983)	24
<i>Dorsey Trailers</i> , 327 NLRB 835 (1999), <i>enforced in relevant part</i> 233 F.3d 831 (4th Cir. 2000)	33
<i>Emsing's Supermarket, Inc.</i> , 284 NLRB 302 (1987), <i>enforced</i> , 872 F.2d 1279 (7th Cir. 1989)	44

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
* <i>General Drivers and Helpers Union, Local 662 v. NLRB</i> , 302 F.2d 908 (D.C. Cir. 1962).....	25
<i>General Indus. Employees Union, Local 42 v. NLRB</i> , 951 F.2d 1308 (D.C. Cir. 1991).....	25, 29
<i>Highlands Hosp. Corp.</i> , 278 NLRB 1097 (1986).....	38
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392 (1996)	19
<i>Lapham-Hickey Steel Corp. v. NLRB</i> , 904 F.2d 1180 (7th Cir. 1990).....	35
* <i>Local No. 627 Int'l U. of Op. Eng'rs v. NLRB</i> , 518 F.2d 1040 (D.C. Cir. 1975).....	45,49,54,57
<i>Mastro Plastics Corp. v. NLRB</i> , 350 U.S. 270 (1956)	24,41
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct. 2635 (2010).....	13
<i>NLRB v. Al Bryant, Inc.</i> , 711 F.2d 543 (3d Cir. 1983)	45
<i>NLRB v. Colonial Haven Nursing Home</i> , 542 F.2d 691 (7th Cir. 1976).....	32
<i>NLRB v. Deaton Truck Line</i> , 389 F.2d 163 (5th Cir. 1968).....	43

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Fleetwood Trailer Co.</i> , 389 U.S. 375 (1967)	25
<i>NLRB v. International Van Lines</i> , 409 U.S. 48 (1972)	24
<i>NLRB v. Midwestern Personnel Servs. Inc.</i> , 322 F.3d 969 (7th Cir. 2003)	29,32,35,36
<i>Pirelli Cable Corp. v. NLRB</i> , 141 F.3d 503 (4th Cir. 1998)	31, 32
<i>RC Aluminum Indus., Inc. v. NLRB</i> , 326 F.3d 235 (D.C. Cir. 2003)	45
<i>R&H Coal Co.</i> , 309 NLRB 28 (1992), <i>enforced</i> 16 F.3d 410 (4th Cir. 1994)	30, 35
<i>Radio & Television Broad. Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc.</i> , 380 U.S. 255 (1965)	45
<i>Research Foundation of City Univ. of New York</i> , 337 NLRB 965 (2002)	58
<i>S. Prairie Constr. Co. v. Local No. 627 Int'l U. of Op. Eng'rs</i> , 425 U.S. 800 (1976)	44,45

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>San Luis Trucking,</i> 352 NLRB 211 (2008) <i>reaffirmed and incorporated by reference</i> , 356 NLRB No. 36 (2010), <i>enforced</i> __ F. App'x __, 2012 WL 1514768 (9th Cir. 2012)	50, 53
<i>Spurlino Materials, LLC v. NLRB</i> , 64 F.3d 870 (7th Cir. 2011)	17, 31
<i>Spurlino Materials, LLC</i> , 353 NLRB 1198 (2009).....	9
<i>Spurlino Materials, LLC</i> , 355 NLRB. No. 77 (2010).....	16
<i>Teamsters Local 115 v. NLRB</i> , 640 F.2d 392 (D.C. Cir 1981).....	24
<i>*Teamsters Local 515 v. NLRB</i> , 906 F.2d 719 (D.C. Cir 1990).....	24,25
<i>Teamsters Local Union No. 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988).....	19
<i>Traction Wholesale Center Co., Inc. v. NLRB</i> , 216 F.3d 92 (D.C. Cir. 2000).....	19
<i>United States Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998).....	19
<i>*Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	19
<i>*Vencare Ancillary Servs., Inc. v. NLRB</i> 352 F.3d 318 (6th Cir. 2003)	38,41

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Virginia Stage Lines v. NLRB</i> , 441 F.2d 499 (4th Cir. 1971)	42,43
<i>Winn-Dixie Stores v. NLRB</i> , 448 F.2d 8 (4th Cir. 1971)	32
<i>Yale Univ.</i> , 330 NLRB 246 (1999)	38

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	18,24
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	3,4,18,24,26,43
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	3,4,18,24,26,43
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2,18
Section 10(f) (29 U.S.C. § 160(f))	2,3

GLOSSARY

A.	The Deferred Appendix
Act	The National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i>)
Board	The National Labor Relations Board
Br.	The Opening Brief of the Company to this Court
Company	Spurlino Materials, LLC, and Spurlino Materials of Indianapolis, LLC, a single employer
GCX	The exhibits introduced by the Board's General Counsel at the hearing before the Board
PLA	The Project Labor Agreement for the Indianapolis stadium and convention center project
SM	Spurlino Materials, LLC
SMI	Spurlino Materials of Indianapolis, LLC
Tr.	The transcript of the hearing before the Board
Union	Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, Local Union No. 716

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 12-1034 & 12-1123

**SPURLINO MATERIALS, LLC and SPURLINO MATERIALS OF
INDIANAPOLIS, LLC, A SINGLE EMPLOYER**

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

**COAL, ICE, BUILDING MATERIAL, SUPPLY DRIVERS, RIGGERS,
HEAVY HAULERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION
NO. 716**

Intervenor for Respondent

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Spurlino Materials, LLC (“SM”) and Spurlino Materials of Indianapolis, LLC (“SMI”) to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order issued against both entities on December 6, 2011, and reported at 357 NLRB No. 126. (A.9-24.)¹ The Board found that SM and SMI (collectively, “the Company”) are a single employer that unlawfully refused to reinstate unfair labor practice strikers. The Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, Local Union No. 716 (“the Union”), the charging party before the Board, has intervened on the Board’s behalf.

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and

¹ “A.” references are to the Deferred Appendix. Parallel citations are to the original record and are abbreviated as set forth in the Glossary. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

(f)). The Company's petition for review and the Board's cross-application for enforcement are timely, as the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the strike was an unfair labor practice strike, and therefore that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work.

2. Whether substantial evidence supports the Board's finding that Spurlino Materials, LLC, and Spurlino Materials of Indianapolis, LLC, are a single employer, and therefore that they are jointly and severally liable for unlawfully refusing to reinstate the strikers.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

In a prior decision ultimately enforced by the United States Court of Appeals for the Seventh Circuit, the Board found the Company violated the Act in numerous respects, including by terminating employee Gary Stevenson for his protected union conduct. In the instant case, the employees went on an unfair labor practice strike to protest the Company's ongoing failure to remedy Stevenson's unlawful discharge. Upon charges filed by the Union, the Board's

General Counsel issued a complaint alleging that Spurlino Materials, LLC, and Spurlino Materials of Indianapolis, LLC, are a single employer that violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate the unfair labor practice strikers upon their unconditional offer to return to work. (A.10, 23; 306, 454.) After a hearing, the administrative law judge found that the two entities are a single employer and violated the Act as alleged. Finding no merit to the Company's exceptions, the Board affirmed, with modifications, the judge's findings and recommended order. (A.9 & nn.1-3.)

I. THE BOARD'S FINDINGS OF FACT

A. The Interrelationship Between SM and SMI: Their Common Ownership and Management, Their Lack of Arm's Length Dealings, Their Exchange of Managers and Employees, and Their Commonly Controlled Labor Relations

SM was formed in 2000, and SMI in late 2005, each as an Ohio limited-liability company with a principal office in Ohio. Both companies supply and deliver ready mix concrete to construction sites. SM's facility is based in Middletown, Ohio, a two-hour drive from the Indianapolis, Indiana area where SMI primarily operates. This case involves a unit of truck drivers and plant operators/batch men at SMI's Kentucky Avenue facility in Indianapolis. (A.10; 76 (Tr.53-55), 146 (Tr.333), 147 (Tr.336), 154-155 (Tr.364-70), 179-180 (Tr.463-69), 204 (Tr.564-65), 496, 512.)

SM and SMI share common ownership and management. James Spurlino—the majority owner, designated manager, and president of both companies—owns 100% of SM, and 52% of SMI. (A.10, 14; 496, 512; *see* A.64 (Tr.6-7), 154-155 (Tr.364-70), 159 (Tr.385), 175 (Tr.447), 179-180 (Tr.464-68), 182 (Tr.476-78).) At Spurlino’s direction, SM was instrumental in SMI’s initial start up, including paying the payroll and other bills for SMI. (A.14-15; 162-163 (Tr.397-99), 176 (Tr.453-54).) Further, while SM and SMI have separate operations managers to handle their day-to-day operations (A.14-15; 76-77 (Tr.55-57), 82 (Tr.79), 205 (Tr.567-69), 224 (Tr.643-44), 234 (Tr.684)), Spurlino controls the two companies’ strategic direction, operating procedures, and capital expenditures. (A.15; 154 (Tr. 366), 155 (Tr.369-70), 205 (Tr.568-69), 224 (Tr.643-44), 234 (Tr.684-85).) For example, Spurlino signs their property leases (A.15; 234 (Tr.684)), decides whether to sell their assets (A.15; 155 (Tr.369-70)), sets up their lines of credit with financial institutions (A.15; 170 (Tr.428-29)), authorizes cash advances and payments between them (A.15; 184 (Tr.484-86)), directs their accounting procedures (A.15; 191 (Tr.513-14), 259 (Tr.781)), and is directly involved in pricing large projects and making major purchases for both companies. (A.15; 157 (Tr.378), 158 (Tr.381), 195 (Tr.527), 234 (Tr.684-85), 255-256 (Tr.764-66).)

The operations of SM and SMI are also interrelated in other respects. For instance, they use the same name (“Spurlino Materials”) on their website, business

cards, business stationery, documents, and trucks. (A.15; 133 (Tr.280-81), 138 (Tr.300), 145 (Tr.328), 146 (Tr.334), 151 (Tr.352), 178 (Tr.461-62), 459, 463, 465, 479-480, 597.) They are listed as “related parties” with common ownership (Spurlino) on their annual financial statements. (A.15; 156 (Tr.371), 159 (Tr.385.) They also use the same Ohio address for billing purposes, and SM’s controller “run[s] the accounting department” for both companies. (A.15; 259 (Tr.781); *see* 134 (Tr.285), 144 (Tr.325-26), 154 (Tr.364), 179 (Tr.465), 183 (Tr.480-81), 261 (Tr.786), 484, 512.)

SM and SMI deal with each other through less than arm’s length transactions. For example, SM charges, but does not invoice, SMI when it provides SMI with equipment, labor and services. (A.16; 138 (Tr.302-03), 148-149 (Tr.343-44).) SM frequently makes large cash advances to SMI, interest-free, without loan agreements or repayment terms. (A.16 & nn.23-24; 159-160 (Tr.386-87), 166 (Tr.413-14), 175 (Tr.448), 184 (Tr.484-85), 189 (Tr.504,506), 198 (Tr.539), 226 (Tr.653), 257 (Tr.771-772), 258 (Tr.775).) SM also pays SMI’s bills for insurance, accounting services, telephone service, and other services. (A.16; 160 (Tr.387-90), 166 (Tr.412-13), 184 (Tr.486), 186-187 (Tr.494-97), 188-189 (Tr.501-03), 194 (Tr.525-26), 195-197 (Tr.530-38), 261 (Tr.786-87).) Although SM’s controller notes a charge on SMI’s account after SM makes the payments, he does not actually invoice SMI for the payments. (A.16-17; 160 (Tr.389), 188 (Tr.502).)

The two companies often interchange managers and employees. For example, Jeff Davidson spent 5 years as SM's Operations Manager before transferring—without completing a new employment application—to the same position at SMI in 2006. (A.15-16; 76 (Tr.54), 132 (Tr.278), 205 (Tr.567).) SM's sales manager routinely travels to Indianapolis to provide training, planning, and strategic support to SMI's sales staff. (A.16; 254 (Tr.760), 260 (Tr.784-85).) And an SM employee performs welding repair work for SMI several weeks a year. (A.16; 81 (Tr.74-75), 142-143 (Tr.319-21), 150 (Tr.349).)

Spurlino, as the common majority owner, president, and general manager, sets overall labor policy for both entities. For instance, he determined the initial wages and benefits for employees at both companies. (A.17 & n.28; 228 (Tr.661), 236 (Tr.691), 271, p. 2.) He continues to be involved in major decisions affecting the wages, hiring, and firing of employees at both entities, and SM's and SMI's operations managers consult him before making such decisions. (A.17 & n.30; 133-134 (Tr.283-84), 147 (Tr.339), 234-235 (Tr.686-87), 235-236 (Tr.690-91), 463.)

B. The Union Becomes the Collective-Bargaining Representative of SMI's Unit Employees; the Board's Two Sitting Members Issue a Decision and Order Finding that SM Unlawfully Discharged SMI Employee Gary Stevenson for His Protected Union Activities; the Litigation Over Stevenson's Discharge Continues

In January 2006, pursuant to a Board-conducted representation election, the Board certified the Union as the exclusive-bargaining representative of the aforementioned unit of SMI's drivers and plant operators/batch men at its Kentucky Avenue facility in Indianapolis. From early 2006 through August 2009, SMI and the Union negotiated, unsuccessfully, for their first collective-bargaining agreement. (A.10; 68 (Tr.21), 84-85 (Tr.87-89), 109 (Tr.185), 211 (Tr.594), 217 (Tr.618), 268.)²

During this period, the Union filed a series of unfair labor practices, and the Board's General Counsel issued a complaint, alleging that SM committed several violations of the Act at SMI's Kentucky Avenue facility. Specifically, the charges and the complaint alleged that in February 2007, SM unlawfully discharged truck driver Gary Stevenson, a leading employee organizer during the union campaign, and a member of the union bargaining committee. (A.10-11; 85 (Tr.89-91), 87 (Tr.100), 96-97 (Tr.135-40), 114 (Tr.205-06), 123 (Tr.243).) In December 2007, following a hearing, an administrative law judge issued a decision and

² The Union's and SMI's attorneys met once more around February 2010 merely to make a list of open bargaining issues. (A.10 n.5; 85 (Tr.89-90), 96 (Tr.135), 98 (Tr.141-42).)

recommended order finding, in relevant part, that SM violated the Act by discharging Stevenson for engaging in protected union activities. In March 2009, a two-member Board affirmed the judge's decision in substantial part, including his findings and recommended order regarding Stevenson's discharge. As a remedy, the Board ordered SM to offer Stevenson reinstatement and make-whole relief for any lost earnings and benefits suffered as a result of his unlawful discharge. *See Spurlino Materials, LLC.*, 353 NLRB 1198, 1200-01 (2009).

Thereafter, SM and the Board sought, respectively, review and enforcement of the Board's decision in the United States Court of Appeals for the Seventh Circuit. Around September 2009, at that court's direction, the parties entered into settlement discussions to resolve the issues raised by the Board's order, including Stevenson's discharge. Those discussions failed to bear fruit, and in March 2010 SM filed its opening appellate brief. (A.11; 85 (Tr.92), 93 (Tr.123-24), 99 (Tr.146).)

C. The Employees Unanimously Vote To Strike To Protest the Company's Ongoing Refusal To Reinstatement Stevenson and Make Him Whole

Also in March 2010, around the time that the parties' efforts to settle the Stevenson discharge case failed, the unit employees began calling Union President Jim Cahill to ask what was happening with the case and with contract negotiations. In response to the employees' apparent frustration "about everything," Cahill

called a union meeting on May 13 to update them and to take a vote on whether to engage in an unfair labor practice strike. (A.11; 99 (Tr.146-47), 103-104 (Tr.162-65), 108 (Tr.183).) About 13 employees, most of the unit, attended. (A.11; 87 (Tr.97), 99 (Tr.148), 125 (Tr.251).)

After brief opening remarks, Cahill turned the meeting over to the Union's attorney in the Stevenson discharge case, Geoffrey Lohman. Lohman updated the employees on the status of the case, describing the unsuccessful, and recently concluded, attempts to settle it. He estimated how much longer the litigation might continue, noting, for example, that the Board and the Union had not yet filed their appellate briefs; that it would take significant additional time for the court to issue a decision after the briefs were filed; that there could be further appeals, including to the Supreme Court; and that there could be additional Board proceedings, and yet more time, to determine the amount of back pay owed to Stevenson for his unlawful discharge. Thus, as Lohman explained, it might "still take years to get the matter fully litigated and concluded." (A.11; 87 (Tr.99-100), 100 (Tr.149), 125 (Tr.251).) Lohman then took questions from the employees, who asked about the pending Seventh Circuit case. There was also at least one question about the status of contract negotiations, in response to which Lohman described the parties' last bargaining session in August 2009 and the issues that remained open. (A.11; 87-

88 (Tr.100-02), 91-92 (Tr.116-17), 93 (Tr.122), 100 (Tr.149), 109 (Tr.187), 114 (Tr.205-07), 121 (Tr.232).)

During the meeting, some employees stated that they should do something to get the Company to comply with the Board's order by reinstating Stevenson, and to resume contract negotiations. (A.11; 100 (Tr.149).) In response, Lohman discussed the possibility of striking. He explained the difference between an unfair labor practice strike and an economic strike, and the legal ramifications of each. Specifically, he advised the employees that the Company would be legally obligated to reinstate them on request if the Board ultimately determined it was an unfair labor practice strike, but not if it was an economic strike and the Company had hired replacements. He informed the employees that the Union was therefore recommending that, if they went on strike, they should do so over Stevenson's unlawful discharge, and that this unfair labor practice should be the reason for the strike. (A.11-12; 87-88 (Tr.100-01), 93-94 (Tr.124-25), 100 (Tr.150), 105 (Tr.169), 114 (Tr.205-06), 120 (Tr.228-31), 126 (Tr.252).) He further advised them that they should have a defined goal, and that getting Stevenson reinstated should be the immediate goal of the strike. (A.12; 106 (Tr.173-74), 111 (Tr.194-95), 114 (Tr.205-06), 116 (Tr.215), 128 (Tr.263).)

The employees then voted unanimously, by secret ballot, in favor of engaging in an unfair labor practice strike. (A.12, 18; 88 (Tr.102), 100 (Tr.150-

52), 105 (Tr.169), 115 (Tr.208-09), 116 (Tr.213-15), 119 (Tr.225), 126 (Tr.252-53).) Thus, employee Terry Mooney stated that he voted “yes” because the Stevenson discharge case had been going on for several years, and “we ha[d]n’t given up . . . on the firing of Gary Stevenson.” (A.18; 115 (Tr.208-09), 116 (Tr.214).) In Mooney’s view, “the first goal of the strike” was “[t]o get Gary Stevenson his job back.” (A.18; 116 (Tr.215).) Similarly, employee Poindexter explained that he voted to go on strike because it was “unfair” that the Company would not allow Stevenson to return to work. (A.18; 126 (Tr.252-53).)

Following the vote, Cahill discussed the timing of the strike. He explained that employees should not go out on strike the next day because the Company was sure to learn about the meeting and would be ready for the strike. He also noted that a strike at that time would have less impact on the Company because its work was sporadic due to bad weather. Cahill said he would let the employees know when the time was right for them to begin the strike. (A.12; 88 (Tr.102), 100 (Tr.151-52), 115 (Tr.209), 126 (Tr.253).)

D. The Company, Anticipating a Strike, Calls Employees to a Mandatory Meeting; the Litigation over Stevenson’s Discharge Continues

Shortly after the employees’ strike-vote meeting, SMI Operations Manager Davidson called them to a mandatory meeting on May 19 at SMI’s Kentucky Avenue facility. At the meeting, which 15-20 employees attended, Davidson read

and distributed a “Strike Information” memorandum stating that “the Company will continue to operate during any strike,” and warning that if employees engaged in an economic strike, the Company would have “the legal right to temporarily or permanently replace any striker.” The memo did not mention the Stevenson discharge case, or how the Company might respond to an unfair labor practice strike. (A.12; 268; *see* 124 (Tr.244), 213 (Tr.599-600), 219 (Tr.625).) On May 21, Davidson distributed another memo, asserting that Company President and Owner Spurlino and other company representatives had met and bargained in good faith with the Union, and would continue to do so upon request. (A.12; 271; *see* 214 (Tr.605-06).)

In June 2010, while the Stevenson discharge case remained pending before the Seventh Circuit, the Supreme Court held in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, that the two-member Board lacked authority to issue decisions. Accordingly, on July 8, 2010, the Seventh Circuit remanded the Stevenson discharge case to the Board.

E. The Employees Begin a Strike To Protest the Company’s Ongoing Refusal To Reinstatement Stevenson, While Offering To Work Only on a Project Covered by a No-Strike Agreement; the Company Refuses the Employees’ Offer and Hires Replacements

A few weeks after the Stevenson discharge case was remanded to the Board, a union steward alerted Cahill that SMI had a “big job” set to start on August 3 “rain or shine.” Accordingly, Cahill decided the time was right for the employees

to begin their strike. That morning, per Cahill's instructions, the union steward, Mooney, and another employee delivered the Union's strike letter to SMI Operations Supervisor/Dispatcher George Gaskin. (A.12 & n.12; 100-101 (Tr.152-53), 107 (Tr.177-78), 115 (Tr.210), 208 (Tr.581-82), 599.) The letter advised the Company that the employees were going on an "unfair labor practice strike" effective that day, which would continue "until Spurlino Materials remedies the unfair labor practice it committed in discharging Gary Stevenson," including "an offer of reinstatement . . . and lost wages and benefits to date." (A.12; 599.)

In its letter, the Union further advised that the strike would "cover all work performed by the bargaining unit which is not subject to a labor agreement with a binding no-strike clause." Specifically, the Union and SMI were signatories to a project labor agreement ("PLA") with a broad no-strike/no lock-out clause that covered a project at the Indianapolis stadium and convention center.³ (A.10, 12; 218-219 (Tr.621-23), 542-598, 599.) Accordingly, the Union stated in its letter

³ The no-strike clause states in pertinent part:

During the life of this Agreement, the [parties] agree they will not collectively or individually incite, organize, coordinate, lead, recognize, engage in, participate in, encourage, or condone any strike, work slowdown, withholding of services, work stoppage, sympathy strike, economic or unfair labor practice strike, refusal to work, walkout, handbilling, picketing, including informational picketing, or other interference with work at the Project Site

(A.542, Article 12.1.)

that it would “continue to honor” the PLA’s no-strike clause; that unit employees assigned to such work would “fully perform all work covered by the PLA;” and that the Union would not engage in any picketing at the covered jobsite. (A.12; 599.)

After receiving the Union’s letter, Gaskin told the employees to wait in the company parking lot until Davidson arrived. (A.12; 115 (Tr.211).) After Davidson arrived, he stated that the Company would continue operating with replacements, and that if the employees were not going to work, they had to leave. The employees then left and began picketing across the street with signs stating that they were on “unfair labor practice strike for the unlawful termination of Gary Stevenson.” (A.13; GCX 4; *see* A.77 (Tr.60), 83 (Tr.84), 101 (Tr.154), 116 (Tr.212-13), 126 (Tr.254).) Twelve employees participated in picketing during the strike, and Stevenson himself joined the picket line. (A.13 & n.16; 107 (Tr.178-79), 109 (Tr.186), 116 (Tr.212-13), 209 (Tr.583, 585), 215 (Tr.609).)

SMI continued operating during the strike by utilizing SM employees from Ohio (A.13; 77-78 (Tr.60-62), 143 (Tr.323), 148 (Tr.342)), and by hiring replacements, who were trained by SM drivers from Ohio (A.13; 80 (Tr.69-70), 150 (Tr.350), 216 (Tr.612).) SMI assigned the Ohio drivers and replacements to its various projects, including the stadium and convention center project covered by the PLA. Although several strikers offered to work on the stadium and

convention center project (consistent with the terms of the Union's strike letter and the PLA), the Company assigned no such work to them. (A.13; 79 (Tr.66-67), 110 (Tr.190-91), 115 (Tr.211), 121 (Tr.234), 218-219 (Tr.621-23).) SMI also denied a grievance filed by the Union on the fourth day of the strike, August 6, objecting to the Company's failure to assign the strikers work covered by the PLA. (A.13; 457; *see* 88-89 (Tr.104-08).) Accordingly, none of the 12 strikers performed any work for the Company during the strike. (A.13; 218 (Tr.622).)

F. The Board Issues a New Decision and Order, Finding Again that SM Unlawfully Discharged Stevenson; SMI's Employees End Their Strike and Make an Unconditional Offer To Return to Work; the Company Refuses To Reinststate Them

On August 9, 2010, a three-member panel of the Board issued *Spurlino Materials, LLC*, 355 NLRB No. 77, adopting the judge's decision and recommended order for the reasons stated in the Board's March 2009 decision and order. The Board found, in agreement with the administrative law judge, that the Company violated the Act by discharging Stevenson for engaging in protected union activities. Accordingly, the Board ordered the Company to offer Stevenson reinstatement and make-whole relief. *Id.* Instead of complying with the Board's order by reinstating Stevenson, the Company filed a petition for review in the Seventh Circuit. The Board cross-applied for enforcement of its order, and the Union intervened in support of the Board.

In the meantime, the striking employees continued to picket SMI. By August 11, the Union still had not received any word from SMI about reinstating Stevenson. Further, the Company's work had apparently slowed down considerably. Accordingly, the Union gave the Company a letter that day stating that the employees were ending their strike and making an unconditional offer to return to work effective August 12. In its letter, the Union also demanded that the Company immediately recall the employees to work. (A.13; 600; *see* 80 (Tr.70), 102 (Tr.158-59), 110-111 (Tr.192-93).) SMI, however, refused to recall any of the strikers. Instead, it advised the Union of its view that the strike was "either an illegal partial strike unprotected by the [Act] or, at best an economic strike," and that there were no jobs available to which the strikers could be recalled, as they had been filled by crossovers (employees who had crossed the picket line to return to work) and permanent replacements. (A.13 & n.16; 601.) Thus, the Company did not reinstate any of the 12 strikers. (A.13; 75 (Tr. 51-52), 80-81 (Tr.71-73), 116-117 (Tr.215-16), 126 (Tr.254).)

Thereafter, the parties continued to litigate the Stevenson discharge case before the Seventh Circuit. On June 23, 2011, the court issued a decision fully enforcing the Board's order. *Spurlino Materials, LLC v. NLRB*, 64 F.3d 870, 882-83 (7th Cir. 2011).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) affirmed the administrative law judge's findings that SM and SMI (collectively, "the Company") are a single employer that violated Section 8(a)(3) and (1) of the Act by failing and refusing to immediately reinstate 12 employees who engaged in an unfair labor practice strike, upon their unconditional offer to return to work. (A.9 & nn.1-3.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A.23-24.) Affirmatively, the Order requires the Company to offer to recall the 12 employees who engaged in the unfair labor practice strike to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions. (A.24.) The Board's Order further requires the Company to make those strikers whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to reinstate them; to remove from their files any reference to the unlawful refusal to reinstate them, and to notify them in writing that the failure to reinstate them will not be used against them in any way; and to post and electronically distribute a remedial notice. (*Id.*)

STANDARD OF REVIEW

This Court's review of the Board's unfair labor practice determinations is "quite narrow." *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board's findings are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Further, the Board's assessment of witness credibility is given great deference and must be adopted unless it is "hopelessly incredible" or "self-contradictory." *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988). The Court will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

SUMMARY OF ARGUMENT

I. Substantial evidence supports the Board's finding that the employees' strike was an unfair labor practice strike, and therefore that the Company violated Section 8(a)(3) and (1) of the Act by admittedly refusing to reinstate the former strikers upon their unconditional offer to return to work. It is settled that a strike is an unfair labor practice strike if the employer's unlawful conduct is a contributing cause. That standard is clearly met here, given the undisputed direct evidence that the employees unanimously voted to strike over the Company's ongoing refusal to remedy its unlawful discharge of prominent union activist Gary Stevenson. Further, that motive is confirmed by the consistent and mutually corroborative testimony of employees who explained that they voted to strike at least in part because they were upset about the Company's foot-dragging in reinstating their coworker. In addition, the reason for the strike was readily apparent from the employees' picket signs and the Union's strike letter, which squarely stated that the employees were conducting an "unfair labor practice strike" over Stevenson's discharge.

In these circumstances, the Company errs in characterizing the evidence as consisting of nothing more than the "self serving" statements of union officials. Nor is the Company correct in claiming that the Board was barred from finding an unfair labor practice strike by the alleged time gap between Stevenson's discharge

and the strike. This claim fails because there was no gap; rather, the Company was still stubbornly refusing to reinstate Stevenson when the employees voted to strike and when the strike began.

Finally, there is no merit to the Company's claim that it could lawfully refuse to reinstate the former strikers because, in its view, they engaged in an unprotected partial strike. The Company basis its mistaken view on the fact that strikers offered to work on a project that was covered by a no-strike clause in a project labor agreement to which the Union and the Company were bound. The Board reasonably found that in these circumstances, the employees were not seeking to unilaterally set their employment terms; rather, they were honoring an existing contract term—namely, the no-strike clause that was mutually agreed upon by the parties.

II. The record amply supports the Board's finding that SM and SMI are a single employer and, as such, are jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers. All four factors showing single employer status are present here: common ownership and management, interrelation of operations, and centralized control over labor relations. Thus, it is undisputed that the two entities have common ownership through James Spurlino, the common majority owner, president, and manager of both companies. Moreover, although the two entities have separate day-to-day

management, Spurlino exercises common managerial control over both companies at the highest level, as he controls their strategic direction, operating procedures, and capital expenditures.

Further, abundant evidence shows that the two entities have highly interrelated operations, as they fail to operate at arm's length, hold themselves out as a single enterprise, and have a significant history of employee and manager interchange. For instance, the lack of an arm's length relationship between the two entities is exposed by SM's frequently providing SMI with labor, equipment, and cash advances—and directly paying SMI's bills—all without any invoices, loan agreements, or written repayment terms. In light of this strong evidence, the Company strains all credulity in claiming that the relationship between the two entities is nothing more than that of "debtor and creditor."

Finally, Spurlino uses his common ownership and management to exercise centralized control over the labor relations of both entities. Thus, Spurlino set the initial wages and benefits for the employees of both entities, and he remains involved in major decisions regarding the wages, hiring, and firing of both companies' workers. Spurlino also met personally with the Union during collective-bargaining negotiations, directly communicated with employees about the Company's bargaining position, and has the final word on whether to accept

any contract approved by the employees. The Company cannot therefore support its claim that the two entities' labor relations are entirely distinct.

In sum, a wealth of evidence demonstrates that SM and SMI have common ownership and management, interrelated operations, and common control over labor relations. Accordingly, the Board properly found that they are a single employer, and are therefore jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE STRIKE WAS AN UNFAIR LABOR PRACTICE STRIKE, AND THEREFORE THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REINSTATE THE STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

The Board found that the employees engaged in an unfair labor practice strike to protest the Company's unlawful discharge of and refusal to reinstate union activist Gary Stevenson. Accordingly, the Board also found that the Company violated the Act by refusing to reinstate the strikers upon their unconditional offer to return to work. The Company admits its refusal but contends it had no duty to reinstate the strikers for two reasons. First, it claims that the employees struck in support of contractual demands and were therefore economic strikers, not unfair labor practice strikers. Second, the Company claims the employees engaged in an unprotected partial strike by offering to work on a

project covered by a no-strike clause between the Union and the Company.

However, settled law and substantial evidence support the Board's finding that the employees struck at least in part to protest the Company's unlawful refusal to reinstate their coworker, Stevenson, and that there was no partial strike. It therefore follows that the Company violated the Act by refusing to reinstate the former strikers.

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Failing To Reinstate Unfair Labor Practice Strikers Upon Their Unconditional Offer To Return to Work

It is settled that unfair labor practice strikers, unlike economic strikers, are entitled to immediate reinstatement upon their unconditional offer to return to work, even if the employer has permanently replaced them. *NLRB v. International Van Lines*, 409 U.S. 48, 50-51 (1972); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1363 n.26 (D.C. Cir. 1983); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 394 (D.C. Cir. 1981).

Therefore, an employer violates Section 8(a)(3) and (1) of the Act⁴ by failing to

⁴ Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." A violation of Section 8(a)(3) results in a "derivative" violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]." *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 7 of the Act (29 U.S.C. § 157), in turn, guarantees employees the right "to self-organization, to form, join, or assist labor

immediately and fully reinstate former unfair labor practice strikers once they have made an unconditional offer to return to work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133, 141 (D.C. Cir. 1999).

It is also settled that “if the employer’s violations of the labor laws are a ‘contributing cause’ of the strike,” then it is an unfair labor practice strike. *General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991); accord *Alwin Mfg. Co.*, 192 F.3d at 141; *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990). Under this well-established standard, even if strikers are motivated by economic concerns as well as labor law violations, the strike is an unfair labor practice strike if the employer’s unlawful acts had “anything to do with causing the strike.” *General Drivers and Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C. Cir. 1962). In applying this standard, the Board examines the “objective and subjective indicia of the strikers’ actual intent in a particular case.” *General Indus. Employees Union, Local 42*, 951 F.2d at 1312 (citations omitted). Because the “Board’s findings regarding the causes of a strike are factual,” this Court “must uphold them if they are supported by substantial evidence in the record as a whole.” *Id.*

organizations, [and] to bargain collectively through representatives of their own choosing”

As shown below, substantial evidence supports the Board's finding (A.17-22) that the employees struck, at least in part, over the Company's refusal to reinstate Gary Stevenson, a prominent union activist whom the Company unlawfully discharged. As such, the employees were unfair labor practice strikers, and the Company violated Section 8(a)(3) and (1) of the Act by its admitted (*see* Br.14) refusal to reinstate them upon their unconditional offer to return to work.

B. The Employees Struck at Least in Part To Protest the Company's Unlawful Refusal To Reinstate Stevenson

1. Ample evidence supports the Board's strike-causation finding

The Board's finding of an unfair labor practice strike is supported by the context and timing of the strike-vote meeting, during which the employees unanimously voted, by secret ballot, to strike in protest over the Company's ongoing refusal to reinstate Stevenson. The credited testimony of employees who attended the meeting confirms that they struck at least in part for this reason. Documentary evidence—the employees' picket signs and the Union's strike letter—further supports the Board's strike-causation finding. (*See* A.18.)

Notably, Stevenson's discharge remained a sore topic among employees, and was still the subject of ongoing litigation in the spring of 2010, when court-sponsored settlement efforts failed to result in Stevenson's reinstatement. Thus, faced with the employees' frustration over the Company's steadfast refusal to

remedy Stevenson's unlawful discharge, the Union called a meeting on May 13 for the purpose of taking a vote among employees on whether to engage in an unfair labor practice strike. (A.11, 18; *see* pp. 9-10, above.) At the meeting, Union Attorney Lohman provided the employees with an update on the Stevenson discharge case, including the recent and unsuccessful attempts to settle it, and explained that it could take years to get the matter fully litigated and concluded. Lohman also explained the differences between an unfair labor practice and an economic strike, and recommended that if the employees went on strike, they should do so to protest the Company's unfair labor practice. (A.18; *see* pp. 9-10, above.)

In this context, the employees then voted unanimously, by secret ballot, to engage in an unfair labor practice strike. *See Citizens Publ. & Printing Co. v. NLRB*, 263 F.3d 224, 235 (3d Cir. 2001) (causal connection between unfair labor practice and strike found where union held meeting during which the unfair labor practices were discussed and a strike vote was taken).

Further, the credited testimony of employee witnesses who took part in the strike vote confirms that the Company's ongoing refusal to remedy Stevenson's discharge was at least one of the reasons for the strike. Thus, employee Terry Mooney explained that he voted "yes" because the Company's refusal to reinstate Stevenson, a leading union advocate, had been going on for several years, litigation

had not changed this frustrating result even after the employees “won” certain issues before the Board, and the employees were “just getting tired of it.” (A.18; 115 (Tr.208-09).) As Mooney summed it up, the employees voted to strike because they wanted to let the Company know that “we’re fighting together and we haven’t given up . . . on all the unfair labor practices and the firing of Gary Stevenson” (A.18; 116 (Tr.213-14).) As Mooney also credibly testified, getting “Gary Stevenson his job back” was “the first goal of the strike.” (A.116 (Tr.215), 119 (Tr.225).) Employee Poindexter likewise testified credibly that he voted to strike because “it was unfair that they were not allowing [Stevenson] to come to work,” that it was “also about sticking together,” and that “if it was me in that situation, I hope that all the [employees] would have my back.” (A.18; 126 (Tr.252-53).)

In response, the Company ignores Mooney’s credited testimony, quoted above, where he plainly stated that getting Stevenson’s job back was “the first goal of the strike.” (A.116 (Tr.215), 119 (Tr.225).) Instead, the Company (Br.34) focuses myopically on his further testimony that employees also “talked about the contracts and the stuff we haven’t been getting.” (A.114 (Tr.206).) As the administrative law judge noted, however, Mooney clarified that he was “frustrated in general over everything that happened . . . not just the contract,” and that the employees “always hoped that if they went on strike for . . . getting [Stevenson’s]

job back, . . . after all that was over, maybe . . . we could get back to the negotiation table.” (A.21; 118 (Tr.223), 119 (Tr.227).) Thus, Mooney’s testimony firmly establishes that the Company’s unlawful refusal to reinstate Stevenson was “a ‘contributing cause’ of the strike.” *General Indus. Employees Union, Local 42*, 951 F.2d at 1311. In these circumstances, it is immaterial that he might also have had concerns about the status of contract negotiations.

As for the administrative law judge’s determination to credit Poindexter’s testimony that he voted to strike because he wanted to have Stevenson reinstated (A.18; 126 (Tr.252-53)), the Company fails to provide any basis for disturbing that ruling. Contrary to the Company’s suggestion (Br.34 n.19), there is nothing “hopelessly incredible” or “self-contradictory” about Poindexter acknowledging (A.129 (Tr.264-65)) that he was also interested in pressuring the Company to agree to a contract. *See* cases cited above at p. 19 (explaining standard for overturning credibility rulings). As noted above, employees are unfair labor practice strikers even if the unfair labor practice is not the only reason for the strike.

Thus, Mooney’s and Poindexter’s mutually corroborative, credited testimony explaining the employees’ unanimous strike vote amply supports the Board’s finding that they voted to strike at least in part because of Stevenson’s discharge and the Company’s unlawful refusal to remedy it. *See NLRB v. Midwestern Personnel Services, Inc.*, 322 F.3d 969, 979-80 (7th Cir. 2003)

(finding that employees went on unfair labor practice strike was supported by credible evidence of their motive); *accord Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133, 141-42 (D.C. Cir. 1999).

In addition, the evidence of motive discussed above is corroborated by documentary evidence and the conduct of the Union and employees during the strike. Thus, both the Union's strike letter to the Company and the picket signs that employees used during the strike explicitly stated that they were engaging in "an unfair labor practice strike" to protest Stevenson's discharge. (A.18; *see pp.* 14-15, above.) *See R&H Coal Co.*, 309 NLRB 28, 28 (1992) (finding that employees were on an unfair labor practice strike was supported by their use of picket signs so stating), *enforced*, 16 F.3d 410 (4th Cir. 1994). In sum, substantial evidence supports the Board's conclusion that the strike was motivated, at least in part, by the Company's refusal to remedy its unlawful discharge of a prominent union activist, and therefore that the Company violated the Act by admittedly refusing to reinstate the strikers upon their unconditional offer to return to work.

2. The Company errs in asserting that the Board based its strike-causation finding on "self-serving" evidence

In response, the Company plainly errs in claiming (Br.27-35) that the foregoing evidence of the employees' motive for the strike should be rejected as the "self serving" statements of a few union officials. *See, e.g.*, Br.29 (claiming that the Board "chiefly relied" on the "self-serving" testimony of union officials).

The Company's claim wrongly ignores the evidence just discussed, including the employees' credited testimony confirming that they unanimously voted to strike, at least in part, to protest Stevenson's unremedied discharge, as well as the documentary evidence confirming their motive.

Based on its mischaracterization of the record, the Company mistakenly holds fast (Br.27, 29-33) to a series of plainly distinguishable cases. For example, the Company primarily relies (Br.29-33) on *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 515-19 (4th Cir. 1998), where the court found that the single employer statement at issue—that employees could lose their jobs if they went on an economic strike—was not coercive in context and therefore not an unfair labor practice. *Id.* at 515-17. The court further found that, even if even the employer's statement were unlawful, the relevant testimonial evidence, which came exclusively from union officials, was insufficient to support a conclusion that the employees, rather than the officials, were upset by the employer's statement. *Id.* at 517-19.

Here, in contrast, the Seventh Circuit fully affirmed the Board's finding that the Company violated the Act by discharging Stevenson, and was, therefore, obligated to reinstate him. *See Spurlino Materials, LLC v. NLRB*, 64 F.3d 870, 882-83 (7th Cir. 2011). And, in stark contrast to the complete absence of relevant employee testimony in *Pirelli*, the employees here credibly testified that

Stevenson's unremedied discharge was a significant reason why they voted to strike. Moreover, further distinguishing *Pirelli*, the employees' testimony here is corroborated their unanimous strike vote and their picket signs, which demonstrate that they went on strike, at least in part, to protest the Company's ongoing refusal to remedy Stevenson's unlawful discharge. *See Midwestern Personnel*, 322 F.3d at 980 (finding *Pirelli* inapplicable given "credible evidence . . . of the employees' sentiment"). Accordingly, this case is nothing like *Pirelli*.⁵

The Company also misses the mark in claiming (Br.32-33) that the employees' stated (and credited) motive for the strike is suspect merely because the Union advised them of the difference between an unfair labor practice

⁵ The other cases on which the Company relies are also distinguishable. For instance, contrary to the Company (Br.27, 29), this case is unlike *Winn-Dixie Stores v. NLRB*, 448 F.2d 8, 11-12 (4th Cir. 1971), where the sole evidence of an unfair labor practice strike—testimony by strikers—was flatly contradicted by the record evidence, including the language on the union's picket signs and handbills. Nor is this case like *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 694, 705-06 (7th Cir. 1976), where the court rejected the finding of an unfair labor practice strike because (1) many of the violations cited by the striking employees as their motivation to strike had occurred after they voted to strike; (2) the employer's "extremely mild" and "technical" pre-strike violations had only a remote connection to the employees' actual reasons for striking; and (3) any finding of an unfair labor practice strike was negated by documentary evidence, including a union press release and bulletin, and employee signs used in picketing. As the Board noted (A.19), that logic has no bearing where the discharge of Stevenson, one of the most active union supporters, was hardly a minor violation of the Act, and the strike-causation finding is supported by credited employee testimony, the language in the Union's strike letter, and the employees' picket signs. *See Midwestern Personnel*, 322 F.3d at 979-80 (distinguishing *Colonial Haven* on similar grounds).

strike and an economic strike. The Company posits (Br.33) that the employees “simply followed the Union’s lead,” as if they were sheep that could not decide for themselves whether to engage in an unfair labor practice strike. *See generally Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (rejecting “low opinion” of employees that presumes them incapable of addressing labor law issues in an intelligent manner). To the contrary, the employees freely and unanimously voted, by secret ballot, to engage in an unfair labor practice strike, as their credited testimony and the documentary evidence confirms. Thus, as the Board noted (A.20), “there is no evidence whatsoever that the employees were threatened or coerced by [the Union].”

Nor should an adverse inference be drawn, as the Company suggests (Br.33), from the Union’s efforts to educate employees about the rules for engaging in an unfair labor practice strike. To so hold, the Board aptly observed (A.20), would effectively require union representatives to be nothing but “potted plants.” Indeed, as the Board has noted in rejecting a similar claim, the employer is responsible for its own violations, and cannot, therefore, blame the union for having “sufficient foresight” to advise employees against walking out to protest something else. *Dorsey Trailers*, 327 NLRB 835, 856 (1999), *enforced in relevant part*, 233 F.3d 831, 839 (4th Cir. 2000).

The Company's remaining claims about "self-serving" testimony simply ignore the relevant facts and applicable law. For example, the Company claims (Br.33-34 & n.19) that the employees expressed their "actual motivation" during the strike-vote meeting when they asked whether the strike would help them get a contract with the Company. It observes (Br.33-34) that Mooney testified that the employees were frustrated that there was no contract after five years. The Company misses the point. As noted above, an unfair labor practice need not be the sole reason for striking; a strike is an unfair labor practice strike if it was motivated, at least in part, by the violation. Accordingly, as the Board noted (A.18-19, 21), even if the strike was partly motivated by the employees' desire for a contract, that does not negate the overwhelming evidence that they were also motivated to strike in order to pressure the Company to reinstate Stevenson.

Finally, the Company utterly fails to explain its contention (Br.34) that "the end of the strike exposes the economic nature of the strike." The Company simply presumes that if the strike had really been about remedying Stevenson's discharge, it would not have ended without his reinstatement. To the contrary, the applicable test is whether the strike was motivated at least in part by the employer's unfair labor practice, not whether the strike actually succeeded in forcing the employer to give in to the employees' demands. Moreover, the Company ignores credited evidence (*see* A.13; p. 17, above) that the employees ended the strike because the

Company's work had slowed to the point that continuing the strike would have had little impact.

3. The Company errs in relying on an alleged time gap between its unlawful conduct and the strike

Nor is the Company correct (Br.35-38) that the foregoing evidence of employee motive should be discredited because of the passage of time between Stevenson's discharge in early 2007 and the employees' decision to strike in May 2010, and/or the onset of the strike in August 2010. To begin, as the Board noted (*see* A.19), while passage of time may be a factor, it is not itself dispositive, particularly where, as here, the credited employee testimony and documentary evidence confirm that the employees struck, at least in part, over the Company's ongoing failure to remedy the unfair labor practice. *Cf. Midwestern Personnel*, 322 F.3d at 979-80 (fact that unfair labor practices occurred 7 months before strike, and were thus "fairly remote" in time, not dispositive where violations were not "dead issues").⁶

Indeed, the Company's time gap argument has little force because the Company was still refusing to remedy Stevenson's unlawful discharge, and his

⁶ *See also R&H Coal Co.*, 309 NLRB 28, 28 (1992), *enforced*, 16 F.3d 410 (4th Cir. 1994) (finding strike was caused by unremedied violations that occurred 13 months prior); *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1186-87 (7th Cir. 1990) (finding unfair labor practice strike despite passage of 7-1/2 months between unlawful conduct and strike).

case was still being actively litigated, both when the employees unanimously voted to strike, and when they engaged in the strike. (A.19; pp. 9-14, above.) As such, there was no time gap between the Company's ongoing failure to remedy the unfair labor practice and the strike.⁷ And the employees' testimony establishes that it was the Company's continued refusal to reinstate Stevenson that motivated them to strike. Thus, it is particularly disingenuous for the Company to claim (Br.29, 31, 36) that the Union never demanded, prior to the strike, that Stevenson be reinstated. This claim overlooks the undisputed fact that the Union filed a charge with the Board in 2007 regarding Stevenson's discharge, and spent the next several years litigating the issue before the Board and the court. Accordingly, as the Board noted (A.20; *see* 108-109 (Tr.184-85)), there was no compelling need for the Union to make a separate request for Stevenson's reinstatement before the strike given that the Board had already (in 2009) unconditionally ordered that Stevenson be offered reinstatement. This is particularly so where, in litigation

⁷ Thus, contrary to the Company's claim (Br.36-37), it is of no moment that the Union waited two months after the first briefs were filed in the Seventh Circuit to call a strike vote, and then another three months to strike. Rather, the relevant fact is that, when the strike vote and the actual strike took place, the Company still had not reinstated Stevenson. The delay between the employees' vote and their actual strike does not, therefore, negate their motive for that strike. Moreover, the credited testimony (*see* A.12; pp. 12-14, above) was that the Union delayed the strike to ensure it would have the most impact on the Company. *See Midwestern Personnel*, 322 F.3d at 979-80 (fact that strike did not ensue immediately after vote does not lessen the causal impact of employer's misconduct where strike was delayed at the union's suggestion); *accord R&H Coal*, 309 NLRB at 28.

challenging the Board's order, the Company opposed, at every turn, the Union's and the General Counsel's efforts to obtain Stevenson's reinstatement.

The Company's claim that the litigation over Stevenson's discharge was too remote in time to have caused the strike also fails because the same could be said of the Company's alternative supposition (Br.33-34) that the lack of progress in contract negotiations caused the strike. As the Board noted (A.19), a significant amount of time had also passed between the parties' last bargaining session in August 2009 and the strike in August 2010. Thus, if, as the Company contends, the passage of time suggests the employees were not motivated by the Company's failure to remedy its violation, it also suggests that they were not motivated by the Company's failure to agree to their contract demands. Accordingly, as the Board explained (*id.*), it is equally likely, based on the passage of time, that the strike was motivated by the unfair labor practice, or both the unfair labor practice and contract negotiations. Either way, substantial evidence supports the Board's finding that the strike was motivated, at least in part, by the Company's unfair labor practice, and, as such, was an unfair labor practice strike.

C. The Strike Was Not an Unprotected Partial Strike

The Board also properly rejected (A.22) the Company's contention (Br.20-25) that the strike was an unprotected "partial strike." The Company bases its claim on the fact that during the strike, the strikers offered to work on the stadium

and convention center project, which was covered by a no-strike clause in the PLA. As shown below, however, the Board reasonably found that the bar against partial strikes does not apply in these circumstances.

The partial-strike doctrine mistakenly invoked by the Company (Br.20-22) prohibits striking employees from setting their own terms and conditions of employment by unilaterally deciding to perform certain of their duties while refusing to perform others. *See Vencare Ancillary Servs., Inc. v. NLRB*, 352 F.3d 318, 322, 324-25 (6th Cir. 2003); *Audubon Health Care Ctr.*, 268 NLRB 135, 136-37 (1983). Thus, in the cases cited by the Company, an unlawful partial strike was found where the employees remained on the employer's premises and unilaterally decided which work they would and would not do, *i.e.*, they attempted to "set their own terms and conditions of employment in defiance of their employer's authority." *Audubon*, 268 NLRB at 137 (findings nurses' aides engaged in unlawful partial strike when they continued to care for patients in their own sections, but refused to do their assignments in "open" sections). *See also Vencare*, 352 F.3d at 322, 324-25 (healthcare workers refused to see any patients but remained on employer's premises to perform paperwork); *Yale Univ.*, 330 NLRB 246, 247 (1999) (teaching fellows continued working but refused to submit their students' final grades); *Highlands Hosp. Corp.*, 278 NLRB 1097, 1097 (1986)

(security guards remained on company premises and performed some of their functions but not others).

The Board reasonably found (A.22) that this is not such a case. Here, in contrast with the cases cited above, the employees did not remain on the Company's premises or unilaterally continue to perform any work. While they offered to work on the stadium and convention center project—an offer that the Company rejected—they did so only because that project, unlike others, was covered by the PLA's no-strike clause (*see* p. 14, above), which explicitly barred the employees (and the Company) from engaging in any work stoppage there. Thus, as the Board explained (A.22), unlike employees in a partial-strike situation, the employees here did not seek to unilaterally “set their own terms and conditions of employment.” *Audubon*, 268 NLRB at 137. Rather, they sought to adhere to and honor an existing term and condition of their employment—namely, the no-strike clause in the PLA—that the Company and the Union had mutually agreed upon.

In response, the Company erroneously contends (Br.23) that the no-strike clause in the PLA is immaterial to the allegedly partial nature of the strike. In so arguing, the Company relies (*id.*) on the false premise that the strikers somehow attempted to “escape” the restrictions imposed on the stadium and convention center project. To the contrary, by making themselves available to work on that

project, the employees sought to comply with, not escape from, the no-strike clause barring them from refusing to work on that project. Thus, this case does not involve allowing employees to “set their own assignments,” as the Company wrongly suggests (Br.23).

In a similar vein, the Company erroneously suggests (*id.*) that in determining whether there was an unlawful partial strike, the Board should have disregarded the reason for the strikers’ willingness to perform only a portion of their work—again, their contractual obligation to comply with the PLA’s no-strike clause. As even the cases cited by the Company show (Br.22; *see* cases cited above at p. 38), the partial strike doctrine focuses on whether the employees unilaterally chose to perform only part of their duties. Here, in contrast, the employees were not acting unilaterally; rather, they were honoring the collectively-bargained terms of the bilateral PLA.

The Company cites no case law supporting its erroneous position (Br.23) that strikers who honor a no-strike clause covering part of their work are engaged in an unlawful partial strike. The absence of any support for the Company’s novel view is unsurprising since such a view would contravene settled labor law policy favoring the right to strike. As the Board noted, had the employees violated the PLA by refusing to perform work on the stadium and convention center project, they would have lost their protection under the Act, and the Company could have

refused to reinstate them on that basis. (*See* A.22, citing *Mastro Plastics v. NLRB*, 350 U.S. 270, 280-81 (1956) (a strike in violation of an express no-strike clause is unprotected).) Thus, as the Board observed (A.22 & n.42), the Company’s “rote application” of the partial-strike bar in these circumstances would place employees in a classic “Catch 22,” as the strike would be unprotected and employees would lose their protections regardless of whether they struck or worked on the project covered by the PLA. In other words, the employees would be forced to choose between completely forfeiting their right to strike or forfeiting their jobs.

Neither the policies underlying the prohibition against partial strikes, nor the cases cited by the Company, support such a broad forfeiture of the right to strike in the circumstances here. Rather, an underlying rationale of the partial-strike bar is that “the employer has a right to know whether or not his employees are striking.” *Vencare*, 352 F.3d at 324. As the Board reasonably found (A.23), “there was no ambiguity about the employees’ intentions” here. After all, “they clearly stated they were on strike, and explained they would remain available to perform work on the convention center project only because of their contractual commitment with the Company not to strike that project.” (*Id.*)

Nor was there any showing that the employees’ mere offer to work on the convention center project impeded the Company from using replacement employees, or made it impractical for it to operate its business, as the Company

wrongly suggests (Br.23-24). Rather, the Company continued to deliver concrete from the beginning of the strike, including to the stadium and convention center project, using temporary and/or replacement drivers. (*See* A.23; p. 15, above.) Further, in so doing, the Company at all times remained in control of the scheduling and assignment of work.⁸

Finally, the Board (A.22) properly rejected the Company's claim (Br.24-25) that the employees engaged in an unlawful partial strike by offering to perform work covered by the PLA even though they did not actually perform any work during the strike. Specifically, the Board reiterated (A.22) that, although the employees offered to work on the convention center project, and initially grieved the Company's failure to call them in for such work, they did not unilaterally continue that work or any other work. Contrary to the Company (Br.25), in emphasizing this point, the Board appropriately relied on *Virginia Stage Lines v.*

⁸ The Company is premature in claiming (Br.23) that it would have been "impossible" to schedule striking drivers to deliver loads on the convention center project only. As the Board explained (A.23 & n.43), it did not need to decide in this case whether, as alleged in the Union's grievance, the Company violated the PLA by failing to call in the strikers for such work. Thus, "[n]othing in this decision prevents the Company from arguing, in any subsequent proceeding [regarding] the Union's grievance that it would have been 'pretty impossible' to call strikers in for PLA work only." (*Id.*) Accordingly, the Company errs in asserting (Br.23-24) that the Board's order "creates[s] a hardship" by forcing the Company to pay the employees for such work. The Board made no such finding. Rather, it found, based on settled law, that the striking employees' mere offer to do such work did not constitute an unlawful partial strike.

NLRB, 441 F.2d 499, 503 n.5 (4th Cir. 1971), and *NLRB v. Deaton Truck Line*, 389 F.2d 163, 168-69 (5th Cir. 1968). Thus, in *Virginia Stage Lines*, 441 F.2d at 503 n.5, the court found the employer's partial-strike analogy "particularly vulnerable" where employees were called to work only when their names reached the top of a list, and they relinquished that position, performed no work, and dropped to the bottom of the list when assigned work covered by strike. And in *Deaton Truck Line*, 389 F.2d at 169, the court rejected the employer's reliance on "readily distinguishable" partial-strike cases in circumstances where strikers collected no pay during the relevant period and made "only an uncompensated offer . . . to work on other terms." Simply put, there is no partial strike where, as here and in the cited cases, the employees performed no work at all during the strike, and where the Company chose to reject their offer to do certain work covered by a no-strike clause.

In sum, the Board reasonably found that the employees engaged in an unfair labor practice strike, and not an unlawful partial strike. Accordingly, the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SM AND SMI ARE A SINGLE EMPLOYER, AND THEREFORE THAT THEY ARE JOINTLY AND SEVERALLY LIABLE FOR UNLAWFULLY REFUSING TO REINSTATE THE FORMER UNFAIR LABOR PRACTICE STRIKERS

The Board's finding (A.14-17) that SM and SMI constitute a single employer for the purposes of the Act is supported by a wealth of evidence, including the Company's admissions, and accords with settled law. In its challenge to that determination, the Company fails (Br.38-45) to demonstrate that substantial evidence and established legal principles do not support the Board's finding. Accordingly, the Board appropriately held SM and SMI jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers.

A. The Board May Treat Nominally Separate Business Entities that Are Integrated with Respect to Ownership and Operation as a Single Employer

It is settled that where, as here, the Board finds two nominally separate entities to be a single employer under the Act, both are jointly and severally liable for remedying unfair labor practices committed by either of them. *See, e.g., Emsing's Supermarket, Inc.*, 284 NLRB 302, 304 (1987), *enforced*, 872 F.2d 1279, 1287-89 (7th Cir. 1989). In determining whether single-employer status exists, the Board considers four factors: common ownership, common management, interrelation of operations, and common control of labor relations. *See S. Prairie*

Constr. Co. v. Local No. 627, Int'l U. of Op. Eng'rs, 425 U.S. 800, 802 & n.3 (1976) (citing *Radio & Television Broad. Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965)); *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 239 (D.C. Cir. 2003).

Not all of these factors need to be present before the Board can find single-employer status, and no one factor is controlling. *RC Aluminum Indus.*, 326 F.3d at 239 (citation omitted). As this Court has recognized, single employer status depends on “all the circumstances” of the case and is characterized by the absence of an “arm’s length relationship found among unintegrated companies.” *Local No. 627 Int'l U. of Op. Eng'rs v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd on this issue per curiam sub nom. S. Prairie Constr. Co. v. Local No. 627 Int'l U. of Op. Eng'rs*, 425 U.S. 800 (1976).

The Company misstates these basic principles in claiming (Br.39-40) that SM has not engaged in any “overt act” that could subject it to a single-employer analysis. Rather, the cases just discussed impose no such requirement, and those cited by the Company do not bar application of the single-employer doctrine here.

Moreover, because “[t]he single employer question is primarily factual,” the Board’s conclusion “must be upheld if supported by substantial evidence.” *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983); *accord Asher Candy, Inc. v. NLRB*, 258 F. App’x 334, 334 (D.C. Cir. 2007) (unpublished). *See also Emsing’s*

Supermarket, Inc., 872 F.2d at 1289 (noting that single-employer status “is essentially a factual [determination] and not to be disturbed provided substantial evidence in the record supports the Board’s findings”) (citations and internal quotations omitted).

B. SM and SMI Are a Single Employer; Accordingly, They Are Jointly and Severally Liable for Unlawfully Refusing To Reinstate the Former Unfair Labor Practice Strikers

Substantial evidence supports the Board’s finding that SM and SMI constitute a single employer and are, therefore, jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers. Indeed, SM admitted that it was the employer of the Indianapolis (SMI) unit employees in its answer to the complaint in the Stevenson discharge case. (*See* A.9 n.1, 11, 15 & n.20.) Moreover, as shown below, an abundance of evidence establishes that all four factors showing single-employer status are present here.

1. Common ownership

To begin, the Board’s finding that SM and SMI are a single employer is supported by overwhelming evidence that they share common ownership. Thus, it is undisputed (Br.43) that they have the same designated manager, James Spurlino, who is also the majority owner and president of both companies. (A.10, 14; 496, 512; *see* 64 (Tr.6-7), 154-155 (Tr.364-70), 159 (Tr.385), 179-180 (Tr.464-68), 182 (Tr.476-78).) James Spurlino owns 100% of SM and 52% of SMI, with the

remaining 48% divided equally between his father, Cyrus Spurlino, and another company, Batch Plant Investments, LLC, owned by a longtime friend of James Spurlino. (A.14; 155 (Tr.367, 370), 175 (Tr.447), 179 (Tr.464-65), 180 (Tr.468).)

Contrary to the Company (Br.43), it is immaterial that there are no other common owners. There is simply no requirement that two entities have multiple common owners before they can be deemed a single employer.⁹ Indeed, proof of common ownership can hardly be any clearer than where one individual—James Spurlino—has majority ownership of both entities.

Nor did the Board find that “common ownership alone” suffices to establish a single-employer relationship, as the Company wrongly suggests (*id.*). Rather, the Board (A.14-17) carefully analyzed all four factors that show single-employer status, including, as discussed below, common management, interrelation of operations, and common control of labor relations.

2. Common management

The record also strongly supports the Board’s finding that SM and SMI share common management. Thus, while SMI’s operations manager (Jeff Davidson) and supervisor/dispatcher (George Gaskin) exercise independent

⁹ The Company (Br.43) also utterly fails to explain why the result should be different merely because, as limited liability companies, neither entity has a board of directors. Rather, as the Board noted, this fact means that all profits are distributed directly to the owners, including Spurlino, as personal income. (A.14; 154 (Tr.365), 179 (Tr.466), 224 (Tr.645).) This hardly vitiates Spurlino’s overall ownership and control of both companies.

authority over day-to-day operations (A.15; 76-77 (Tr.55-57), 82 (Tr.79), 205 (Tr.567-69), 224 (Tr.643-44), 234 (Tr.684)), it is James Spurlino, as majority owner, president, and manager of both SM and SMI, who controls their strategic direction, operating procedures, and capital expenditures. (A.15; 154 (Tr.366), 155 (Tr.369-70), 205 (Tr.569), 224 (Tr.643-44), 234 (Tr.685).) For instance, Spurlino signs the property leases for both companies (A.15; 234 (Tr.684)), decides whether to sell their assets (A.15; 155 (Tr.369-70)), sets up their lines of credit with financial institutions (A.15; 170 (Tr.429)), authorizes cash advances and payments between the two companies to pay their debts (A.15; 184 (Tr.484-86)), and directs their accounting procedures (A.15; 191 (Tr.513-14), 259 (Tr.781).) Spurlino also executes agreements between the two companies, signing for both of them; and he approves invoices submitted to SM and/or SMI from vendors. (A.15; 157 (Tr.378), 158 (Tr.381), 195 (Tr.527), 231 (Tr.673-74), 255 (Tr.764), 256 (Tr.766), 481-483, 484.) Finally, he is directly involved in pricing large projects and making major purchases for both companies. (A.15; 234 (Tr.684-85).) As such, there is little doubt that Spurlino exercises control of both entities at the highest level.

Contrary to the Company (Br.43-44), the Board did not “ignore” evidence that the two entities have separate management at the day-to-day level. Rather, as shown above, the Board explicitly acknowledged that evidence, but found that the more critical consideration was Spurlino’s exercise of common ““overall control of

critical matters at the policy level’” for both entities. (A.15 (quoting *Bolivar Tees*, 349 NLRB 720, 721 & n.4 (2007), *enforced*, 551 F.3d 722 (8th Cir. 2008)).) *See Local No. 627*, 518 F.2d at 1046 (noting that such exercise of common “control at the top level of management would not be found in the arm’s length relationship existing among unintegrated companies”). Thus, substantial evidence and settled law support the Board’s finding that, through Spurlino, the two companies share not only common ownership, but also common management, which are two of the factors showing single-employer status. *See* cases cited above at pp. 44-45.

3. Interrelation of operations

A wealth of evidence supports the Board’s finding (A.15-17) that SM and SMI have highly interrelated operations. Thus, as shown below, the two entities do not operate at arm’s length, hold themselves out as a single enterprise, and have a significant history of employee and manager interchange.

From the beginning, SMI’s operations were interrelated with those of SM, and the two entities never operated at arm’s length. Indeed, at Spurlino’s direction, SM was instrumental in SMI’s initial start up, including paying the payroll and other bills for SMI. (A.15; 162-163 (Tr.398-99), 176 (Tr.453-54).)

Further, the lack of a true arm’s length relationship between the two entities is manifest in SM’s providing SMI with labor, equipment, cash advances, and loans—as well as SM’s directly paying SMI’s bills—all without invoices, loan

agreements, or written repayment terms. For example, when SM and SMI charge each other for their shared equipment, labor and services, they do not actually invoice each other. (A.16; 138 (Tr.303), 148-149 (Tr.343-44).) There is no evidence of any similar arrangement between SM/SMI and unrelated companies with whom they do business. (*See* A.16; 138 (Tr.301-03) (unrelated companies invoice SMI for leased trucks and drivers).)

The absence of an arm's length relationship between the two entities is also demonstrated by SM's frequent practice of making large, interest-free cash advances to SMI that are used to cover SMI's debts and/or pay down its line of credit with the bank. These cash advances are made without any loan agreement, repayment terms, or interest charged, notwithstanding SMI's long-term negative balances (consistently over \$500,000) since February 2010. (A.16 & nn.23-24; 159-160 (Tr.386-87), 166 (Tr.413-14), 175 (Tr.448), 184 (Tr.484), 189 (Tr.504, 506), 198 (Tr.539), 226 (Tr.653), 257 (Tr.771-772), 258 (Tr.775), 261 (Tr.788), 467.) By contrast, SM does not provide interest free cash advances to customers or unrelated entities with whom it does business. (A.16 & n.24; 181 (Tr.473).) *See San Luis Trucking*, 352 NLRB 211, 227 (2008) (finding entities were single employer where one gave the other interest free loans without any written agreement), *reaffirmed and incorporated by reference*, 356 NLRB No. 36 (2010), *enforced*, __ F. App'x__, 2012 WL 1514768 (9th Cir. 2012) (unpublished).

The absence of an arm's length relationship between the two entities is also readily apparent from the undisputed evidence that SM regularly pays SMI's bills directly. For example, 5 years after Davidson transferred from SM to SMI, he was still using an SM credit card, and his charges on behalf of SMI were therefore paid by SM. (A.16; 196 (Tr.531), 197 (Tr.535-36).) SM also pays for SMI's medical insurance policy even though the companies have separate policies and are billed separately. (A.16; 188-189 (Tr.501-03), 194 (Tr.526), 467.) And SM pays SMI's portion of the bill when a vendor submits a single, comingled invoice to SM covering both entities. Such comingled invoices are regularly submitted by their common business development firm, accounting firm, telephone provider, 401(k) plan administrator, and disability insurance provider. (A.16; 160 (Tr.387-90), 166 (Tr.412-13), 184 (Tr.486), 186-187 (Tr.494-97), 189 (Tr.503), 194 (Tr.525), 195-196 (Tr.530-34), 261 (Tr.786-87), 467.) Although SM's controller will note a charge to SMI's account for these invoices, SM is the entity that makes the payments. SM does not actually invoice SMI for the payments. (A.16-17; 160 (Tr.389), 188 (Tr.502), 189 (Tr.506).) Moreover, as with the other transactions noted above, there is no evidence that SM provides similar billing services to unrelated companies.

In addition, the company ledger covering both entity's finances shows the frequent movement of large sums of money between them, which are described

simply as “reclass” (i.e., reclassification). For example, a ledger entry for July 31, 2008, shows four “reclass” credits totaling \$320,000, and three “reclass” debits totaling \$527,000. (A.17; 467, p. 5.) There are, however, no invoices or other documentation explaining such “reclass” entries. Indeed, neither the ledger nor the annual financial reports filed by the companies’ shared accountant specify the actual reason for these transactions. (A.17 & nn.26-27; 159 (Tr.383), 165 (Tr.407, 409-10), 171 (Tr.434), 184 (Tr.483-84), 185 (Tr.488), 186-187 (Tr.493-95), 188 (Tr.502).)

The interrelated nature of SM’s and SMI’s operations is further demonstrated by how they hold themselves out as a single enterprise—simply as “Spurlino Materials”—on their internet website, business cards, stationery, business documents, and trucks. (A.15; 133 (Tr.280-81), 138 (Tr.300), 145 (Tr.328), 146 (Tr.334), 151 (Tr.352), 178 (Tr.461-62), 182 (Tr.476), 459, 463, 465, 479-480, 597.) They are also listed as “related parties” with common ownership (namely, Spurlino) on annual financial statements prepared by their shared accounting firm. (A.15; 156 (Tr.371), 159 (Tr.385).) In these circumstances, it is not surprising that Spurlino and Davidson have referred to the two companies as a single entity in conversations and official correspondence with employees. For example, in an April 2009 letter to “All Indianapolis Employees,” Spurlino noted that “many of our employees living in Ohio [SM], Indiana [SMI], and Kentucky”

earned bonuses because they had helped make “the company” successful, and that “we are the same fair and consistent employer that several hundred people have worked for over the years.” (A.15; 463.) Likewise, Davidson and other company officials referred to SMI as “our Ohio division.” (A15; 78 (Tr.63).) Further, as discussed above, SM did not dispute in the Stevenson discharge case that it was the employer of the SMI unit employees. (A.13 n.17, 15 n.20; 312.)

As the Board noted (A.15), there is good reason for this, namely, that SM’s and SMI’s operations are in fact interrelated. This is shown, for example, by their use of the same address for billing purposes, and the same accounting department to pay those bills. Thus, SMI, which operates in Indiana, continues for certain purposes to use the Middletown, Ohio address set forth in its original operating agreement (A.512), which is also SM’s primary address (A.154 (Tr.364), 179 (Tr.465).) Accordingly, all invoices for SMI’s purchases and most payments to SMI are sent to SM’s Middletown facility. And, SM’s controller also does all of the accounting for SMI, i.e., he “run[s] the accounting department” for both companies. (A.15; 259 (Tr.781); *see also* 134 (Tr.285), 144 (Tr.325-26), 183 (Tr.480-81), 261 (Tr.786), 484.) *See San Luis Trucking*, 352 NLRB at 227 (finding single-employer status where two entities shared common accounting department).

Finally, the interrelated nature of the two companies' operations is further underscored by the significant history of employee and manager interchange between them. *See Local 627*, 518 F.3d at 1047 (noting that "interchange of key personnel" supports a single-employer finding). Davidson, for example, was SM's operations manager for 5 years before transferring to the same position at SM in 2006 without even completing a new employment application. (A.15-16; 76 (Tr.54), 132 (Tr.278), 205 (Tr.567).) SM's sales manager in Ohio spends several days a month in Indianapolis training and supporting SMI's sales staff. (A.16; 254 (Tr.760), 260 (Tr.784-85).) And an SM employee does major welding repair work for SMI in Indianapolis about 4 weeks per year. (A.16; 81 (Tr.74-75), 142-143 (Tr.319-21), 150 (Tr.349).) In addition, SM's truck drivers have delivered concrete for SMI, and vice-versa, and SM drivers trained replacement workers at SMI during the strike. (A.16; 79 (Tr.66), 81-82 (Tr.76-78), 126-127 (Tr.255-56), 137 (Tr.296-99), 143 (Tr.322-23), 148-150 (Tr.343-50).)¹⁰

In response, the Company boldly ignores this mountain of evidence—including SM's frequent grant of large cash advances to SMI without any invoices, the two entities holding themselves out as a single company, and their significant

¹⁰ For example, prior to start of the strike, SMI and SM jointly scheduled several employees from Ohio to work in Indianapolis to cover SMI's heavy workload at that time. Further, after SMI received the Union's strike letter, SM sent several more employees to SMI to deliver concrete and train replacement workers. (A.16 & n.21; 77-78 (Tr.60-62), 135-136 (Tr.291-92), 148 (Tr.342).)

employee interchange—proving that SM and SMI are highly interrelated entities. For example, the Company strains all credulity when it nonetheless asserts (Br.41-42) that “there is no relationship between the entities” other than that of “debtor-creditor.”

Undeterred, the Company resorts to cherry picking the few bits of evidence it thinks fall in its favor. Even then it gets its story wrong, and otherwise fails to overcome the great weight of evidence supporting the Board’s finding that the operations of SM and SMI are interrelated. For example, the Company claims (Br.42) that the administrative law judge should have credited Spurlino’s testimony that, when SMI and SM share labor, they typically charge each other a 30 percent premium. (A.166 (Tr.411), 172 (Tr.436), 173 (Tr.441-42), 231 (Tr.673-74).) However, the judge reasonably credited the contrary testimony of SM Controller Bumgardner, who stated that SM charges only the employees’ hourly rate. (A.16 & n.22; 184-185 (Tr.486-87), 187 (Tr.496), 194 (Tr.524), 195 (Tr.527-28).) As the judge explained, he gave more weight to Bumgardner’s testimony because he is the one who calculates those charges, and because Spurlino’s testimony was in other respects inconsistent with the weight of the evidence. (A.16 n.22.) On review, the Company does not even assert, much less prove, that the judge’s credibility ruling was “hopelessly incredible” or “self-contradictory.” *See* cases cited at p. 19. In any event, even if the judge had credited Spurlino’s claim, it would not explain the

lack of invoices for such charges between the companies, which demonstrates the absence of a true arm's length relationship. Nor would it knock down the mountain of other evidence just discussed.

The Company fares no better in citing (Br.41-42) a litany of particular ways in which the two companies allegedly behaved as if they were truly separate entities, ranging from having separate phone numbers and fax machines to separate insurance policies and 401(k) accounts. Given the overwhelming evidence of interrelationship presented here, these are, at best, the proverbial exceptions that prove the rule. Indeed, when these facts are viewed in context, they fully support the Board's finding of single-employer status. As shown, for example, while SMI and SM have separate insurance policies, 401(k) accounts, and phone lines (Br.42), it is SM that pays those expenses based on commingled bills, and without invoicing SMI.

4. Common control of labor relations

Finally, the record amply supports the Board's finding (A.17) that the labor relations of both entities are commonly controlled. Thus, while SM and SMI each have operations managers and dispatchers who exercise day-to-day operational authority, it is James Spurlino—the majority owner, president, and general manager of both companies—who has the ultimate authority. He exercises that authority by, for example, determining the initial wages and benefits for the

employees of both companies. (A.17 & n.28; 228 (Tr.661), 236 (Tr.691), 271, p. 2.) He also continues to be involved in major decisions affecting the terms and conditions of employment of workers at both entities. Thus, the operations managers at SM and SMI consult Spurlino before making decisions concerning wage increases, the expansion or contraction of the workforce, and the termination of employees. (A.17 & n.30; 133-134 (Tr.283-84), 147 (Tr.339), 205 (Tr.569), 234-235 (Tr.686-87), 235-236 (Tr.690-91), 463.) In addition, both companies have used the same labor-management firm—The Weisman Group, whose principals were also minority owners of SMI until late 2008—to develop employee policies, employment documents, and screen employee applicants. (A.155 (Tr.367), 156-157 (Tr.373-75), 158 (Tr.381), 180 (Tr.468), 484.) This evidence goes a long way toward establishing that labor relations at the two entities are commonly controlled. *See Local No. 627*, 518 F.2d at 1046 (centralized control over labor relations found where the same top management set the “framework” for the wages, hours, and benefits for both companies).

Further, although Davidson has been the Company’s main bargaining representative in negotiations with the Union, Spurlino has also personally met with the Union and communicated directly with employees regarding the negotiations. (A.17; 236 (Tr.694), 271, p.1, 463.) It is therefore misleading for the Company to claim (Br.45) that no SM representative has ever participated in

negotiations with the Union. Rather, Spurlino, the majority owner, president, and manager of both SM and SMI, was involved in communicating with the Union and in explaining the Company's bargaining position to employees. Indeed, Davidson reminded the employees that Spurlino would have final say on any contract they ratified. (A.17; 271, p. 2.) Finally, Spurlino co-authored the two "strike information" memos that the Company sent to unit employees in May of 2010. (A.17; 214 (Tr.605), 216 (Tr.614), 217 (Tr.617), 219 (Tr.624), 268-273.)

Given the foregoing evidence, the Company cannot prove its claim (Br.45) that the two companies' labor relations are "entirely distinct and separate." For example, the Company misses the mark in claiming (*id.*) that neither entity controls the hiring or firing of the other's employees. The Company's claim ignores how Spurlino, as the majority owner, president, and general manager of both companies, exercises significant control over such decisions, and retains ultimate and centralized authority over the labor relations of both entities. The Company's claim also ignores SM's prior admission that it was the employer of the SMI unit employees.¹¹

¹¹ Thus, contrary to the Company (Br.45), this case is unlike *Research Foundation of City Univ. of New York*, 337 NLRB 965, 970-71 (2002), where the Board found that a private corporation and a public university did not constitute a single employer because they lacked common ownership, and there was no significant integration of operations or common control over labor relations.

In sum, the record amply demonstrates that SM and SMI have common ownership and management, interrelated operations, and common control over labor relations. Accordingly, the Board properly found that SM and SMI are a single employer, and therefore that they are jointly and severally liable for unlawfully refusing to reinstate the former unfair labor practice strikers upon their unconditional offer to return to work.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review, and enforcing the Board's Order in full.

s/Julie B. Broido

JULIE B. BROIDO

Supervisory Attorney

s/Greg P. Lauro

GREG P. LAURO

Attorney

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2996

(202) 273-2965

LAFE E. SOLOMON

Acting General Counsel

CELESTE J. MATTINA

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

September 2012

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SPURLINO MATERIALS, LLC AND)	
SPURLINO MATERIALS OF INDIANAPOLIS,)	
LLC, A SINGLE EMPLOYER)	
)	
Petitioner)	Nos. 12-1034, 12-1123
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	25-CA-31565
)	
and)	
)	
COAL, ICE, BUILDING MATERIAL, SUPPLY)	
DRIVERS, RIGGERS, HEAVY HAULERS,)	
WAREHOUSEMEN AND HELPERS, LOCAL)	
UNION NO. 716)	
Intervenor for respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,723 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of September, 2012

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Sec. 7. [Sec. 157.] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a).] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Sec. 10(a). [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

10(f) [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to

have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SPURLINO MATERIALS, LLC AND)	
SPURLINO MATERIALS OF INDIANAPOLIS,)	
LLC, A SINGLE EMPLOYER)	
)	
Petitioner)	Nos. 12-1034, 12-1123
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	25-CA-31565
)	
and)	
)	
COAL, ICE, BUILDING MATERIAL, SUPPLY)	
DRIVERS, RIGGERS, HEAVY HAULERS,)	
WAREHOUSEMEN AND HELPERS, LOCAL)	
UNION NO. 716)	
)	
Intervenor for respondent)	

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

Alvin Jack Finklea
James Harold Hanson
Timothy Wayne Wiseman
Scopelitis, Garvin, Light, Hanson & Feary, PC
10 West Market Street
Suite 1500
Indianapolis, IN 46204-0000

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of September, 2012